The father's report to the police was that his son, Pandian, had told him that the plaintiff had been knocked down when he was crossing the road from the left to the right hand side of Havelock Road; not, be it noted, while he was standing still by the side of the road. Yacob's evidence on this subject of zig-zagging is, in my view, unworthy of belief.

The reasons given by the learned trial judge for finding it difficult to accept the defendant's version are so, it seems to me, not justified by the evidence. His finding that the defendant was not telling the truth was based, in my judgment, on erroneous inferences and an incorrect appreciation of the facts.

There was no evidence to support the learned trial judge's finding that the plaintiff was knocked down as soon as he attempted to cross the road, that is as soon as he stepped forward. The reasons he gave, namely that the only injury was to the lower part of the plaintiff's right leg cannot possibly, so it seems to me, have any bearing as to where on the road the accident occurred. Furthermore, the other reason which he gave, namely, that the defendant's evidence was that after travelling some 20 feet or so he stopped his car and turned round to see what had happened and saw the plaintiff lying some 4 to 5 feet away from the edge of the road is, if anything, inconsistent with the plaintiff being struck just as he stepped on to the road. Furthermore, the evidence of the defendant was wholly consistent with his report made to the police but a few moments after the accident.

The learned trial judge's finding as to there being two lines of closely parked cars on either side of the road is again in my view not supported by the evidence.

Finally, the probabilities of the matter support the defendant's case.

After a close examination of the record and having had the benefit of the argument of counsel, I have arrived at the clear conclusion that there was no negligence established on the part of the defendant and that the infant plaintiff was solely responsible for this accident and was unhappily the author of his own misfortune.

In my judgment the appeal must be allowed with costs here and in the court below. The deposit will be paid out to the appellant's solicitor.

Tan Ah Tah Ag.C.J.: I concur.

Chua J.: I concur.

Solicitors: *Ironside & de Souza; Edwin D'Souza & Co.*

ROBERTS alias KAMARULZAMAN v. UMMI KALTHOM

[O.C.J. (Raja Azlan Shah J.) November 19 and 29, 1965]

[K.L. — Civil Suit No. 760 of 1964]

Muslim Law — Jointly acquired property — Harta sapencharian — Division on divorce — Property registered in name of wife — Whether a gift.

Malay customary law — Harta sapencharian — Presumption — Division on divorce.

Harta sapencharian is a matter of Malay *'adat* and is applicable only to the case of a divorced spouse who claims against the other spouse during his or her lifetime; this rule of law is local law which the court must take judicial notice and it is the duty of the court to propound it. Once it is clearly established that property was acquired subsequent to the marriage out of their joint resources or by their joint efforts a presumption arises that it is *harta sapencharian.* The presumption is rebuttable by evidence such as that the property was acquired by the sole efforts or resources of the husband or by the evidence that it was a gift made to the wife. With regard to the division of the *harta sapencharian* generally throughout the States of Malaya a divorced spouse is entitled to a share. The share of a Perak woman is fixed at one-third following the State Council Minute of 1907. In the other States the general trend is a half-share depending on the particular circumstances.

The question for determination in this case is whether a Muslim divorced husband can claim a half share as *harta sapencharian* of immovable property jointly acquired by both spouses during the coverture of their marriage but registered in the name of the wife.

The plaintiff, who had divorced the defendant, claimed a half share in a home at Setapak, Kuala Lumpur, which had been purchased during the marriage for the sum of $50,000, out of which the plaintiff raised $40,000 while the defendant raised $10,000. The property was registered in the name of the defendant. The defendant contended that the plaintiff had made a gift of the property to her.

Held: (1) the property was acquired by the joint resources of the parties and was therefore *harta sapencharian* and on the evidence the defendant had failed to establish the unequivocal manifestation by the plaintiff of an intention to make a gift of the property to her;

(2) a Muslim divorced husband can claim a half share as *harta sapencharian* of immovable property jointly acquired by both spouses during the coverture of the marriage and the fact that the land was registered in the name of the wife was no bar to his claim as the provisions of the Land Code with regard to indefeasibility of title of registered land did not affect matters relating to *harta sapencharian;*

(3) in this case the plaintiff was entitled to a share in the property and the court was prepared to award an equal share to each of the parties if they agreed.

Cases referred to:—

(1) *Hujah Lijah binte Jamal* v. *Fatimah binte Mat Diah* [1950] M.L.J. 63.

(2) *Teh Rasim* v. *Neman* (Perak Supreme Court Suit No. 232 of 1919) (1937), 15/1 J.M.B.R.A.S. 18.

(3) *Wan Mahatan* v. *Haji Abdul Samat* (Ipoh Civil Appeal No. 27 of 1925) (1937), 15/1 J.M.B.R.A.S. 25.

(4) *Re Elang, Re Kulop Degor* and *Lebar* v. *Niat* (1937), 15/1 J.M.B.R.A.S. 48.

(5) *Wan Nab* v. *Jasin* (Kedah Civil Appeal No. 37 of 1922) (1937), 15/1 J.M.B.R.A.S. 20.

(6) *Habsah binte Mat* v. *Abdullah bin Jasoh* [1950] M.L.J. 60.

(7) *Laton* v. *Ramah* (1927), 6 F.M.S.L.R. 116, 128; 15/1 J.M.B.R.A.S. 35.

(8) *Re Noorijah* (Selangor Civil Appeal No. 44 of 1934) (1937), 15/1 J.M.B.R.A.S. 59.

CIVIL SUIT.

M. S. Naidu for the plaintiff.

Kamarul Ariffin for the defendant.

Cur. Adv. Vult.

Raja Azlan Shah J.: The question for determination which in the precise form in which it comes before me can be formulated as follows. It is whether a Muslim divorced husband can claim to a half share as *harta sapencharian* of immovable property jointly acquired by both spouses during the coverture of their marriage but registered in the name of the wife.

The latest exposition of the law on *harta sapencharian* was judicially considered by Briggs J. in 1950 in *Hujah Lijah bte Jamal* v. *Fatimah bte Mat Diah.*[1] He defined it as "acquired property during the subsistence of their marriage of a husband and wife out of their resources or by their joint efforts". After stating that "on full consideration of those cases and of the views of the learned author" in the valuable treatise of *Taylor* on "Malay Family Law" printed in Part 1 of Volume XV of the *Journal of the Malayan Branch, Royal Asiatic Society* (May 1937), the trial judge said at page 64:

"....I think there can be no doubt that the rules governing *harta sapencharian* are not a part of Islamic law proper, but a matter of Malay *'adat*".

And in a later passage:

"In view of the clear recognition of *harta sapencharian* both in various States and by the courts, I am prepared to hold that the rules governing it now form part of the general law of the State....".

It is desirable to discuss the facts of that case at a later stage, but for the moment I shall endeavour to state the position of *harta sapencharian* in the various States of Malaya in general and in the State of Selangor in particular.

In Perak the question of *harta sapencharian* was set at rest by a Perak State Council Minute dated the 18th January, 1907, which declared and ordered to be recorded:

"that the custom of the Malays of Perak in the matter of dividing up property after divorce, when such property has been acquired by the parties or one of them during marriage, is to adopt the proportion of two shares to the man and one share to the woman and that gifts between married persons are irrevocable either during marriage or after divorce".

Kathis are called in as advisers on principle where claims to such property are dealt with by the court or Collectors of Land Revenue in the case of land registered in the Mukim registers. In *Teh Rasim* v. *Neman,*[2] it was held that a Malay divorced wife who had assisted to cultivate land acquired by the husband during the coverture was entitled to one-third share of the value of the land in spite of the proved fact that she was divorced for adultery. In *Wan Mahatan* v. *Haji Abdul Samat* [3] it was held that the divorced wife's share of one-third would not be defeated in divorce by *tebus talak* unless the consideration thereof was the waiver of her claim to *harta sapencharian.* The divorced woman's one-third share may be increased to one-half if she assisted in the actual cultivation of the land. Thus, *Taylor* at page 55 of his work said:

"....in the Perak River kampongs there is a custom almost invariably followed, by which on divorce the property acquired during the marriage is divided between the parties — the division depends on circumstances and is arranged by the two families and the *Ketua Kampong;* if the woman assisted in the actual cultivation she can claim half. If she did not work on the land she receives a smaller share — perhaps one-third. If a man of this class earns a salary (e.g. as a Government servant) and property is bought out of his earnings the wife's share is one-third".

See in *Re Elang, Re Kulop Degor* and *Lebar* v. *Niat.*[4] However, in *Wan Mahatan* v. *Haji Abdul Samat, supra* the *Kathi* of Larut stated that where a woman marries a person who earns wages so that the woman does not work, property obtained during coverture is not in partnership with the woman but is appropriated to the husband alone.

In Kedah it was held that on the dissolution of a Malay marriage the property acquired by both husband and wife is divided between them but there is no established rule or principle to guide the court in deciding their respective share: *Wan Nab* v. *Jasin.*[5] In that case the appellant sued her husband, the respondent, for her share of their joint earnings during marriage up to the time of their quarrel and separation, roughly a period of seven years. But in *Habsah bte Mat* v. *Abdullah bin Jusoh,*[6] Callow J. held that by Malay customary law in Kedah a woman is entitled on divorce to half of any property acquired during the coverture by joint efforts and that her subsequent marriage was no bar to her claim. That was a claim by the plaintiff-wife for the transfer of a half-share in land which was registered in the name of the defendant-husband. The parties possessed no real property on marriage but subsequent thereto acquired certain land. At page 60 Callow J. remarked:

"There is evidence that the plaintiff was seen working over a period on the land S.P.K. 4057 with her then husband the defendant. In my judgment once it is established that the property was acquired subsequent to marriage, and the wife was seen working thereon, a presumption arises that on divorce it is subject to *sharikat.* This can be rebutted by evidence showing that the land was acquired by the sole efforts and resources of the husband".

In Kelantan in *Hujah Lijah bte Jamal* v.

Fatimah bte Mat Diah, supra a widow claimed as *harta sapencharian* one-half share of certain land registered in the Mukim register in the name of her deceased husband. It was proved that prior to her marriage she owned certain land. Her husband owned no land. Both spouses worked her land and from the income of the land they bought more land and again it was worked by both of them. Briggs J. awarded the widow a half-share of the land as *harta sapencharian.*

In Pahang, *harta sapencharian* is fixed by Pahang custom. A divorced wife can claim *harta sapencharian* but there is no fixed rule as to her share. But it would appear that she can get either an equal or unequal share pursuant to an agreement between the parties or confirming a gift or by judgment of the *Kathi.**

In Selangor there is an absence of reported cases as to the share of a divorced wife in the *harta sapencharian.* In *Laton* v. *Ramah,*[7] on the evidence of *Kathis* the trial judge allowed a claim by a widow to a share in her deceased husband's estate at the time of his death, but the Court of Appeal held that the evidence of the *Kathis* was not admissible. Thorne J. in delivering the judgment of the court said at page 129:

> "The question in debate was not, in the view which I take, a question of foreign law at all, but the question was, in the events that had happened, what was the rights of the plaintiff according to the law of this land in the estate of her deceased husband. The local law is on a matter of which the court must take judicial notice. The court must propound the law, and it is not competent to the court to allow evidence to be led as to what is the local law".

A re-trial was ordered, but eventually the parties arrived at a settlement and a consent order was made. *Taylor* explained that the decision of the Court of Appeal led to the passing of the Muhammadan Law and Malay Custom (Determination) Enactment of 1930. At page 12 of his work he stated:

> "The case is noteworthy because although in accordance with the established practice of the Supreme Court oral evidence of the law or custom applicable had been given by *kathis* at the trial without objection it was held on appeal that this evidence was legally inadmissible. This decision left disputed issues of Muhammadan law at a deadlock for no judge or collector could undertake to decide abstruse questions unaided and since he was debarred from taking evidence he was left without any possible means of informing himself. This led directly to the passing of the Muhammadan Law and Malay Custom (Determination) Enactment of 1930 which enables any judge or collector before whom a question of Muhammadan law or Malay custom arises to draw up a statement of the facts and submit the question to the Ruler of the State in Council for decision".

In 1935 the case of *Re Noorijah, deceased* [8] was decided. In that case the deceased was the wife of a public servant. She left eleven lots of mukim register land registered in her own name. The husband filed an application for distribution. It was proved that the lands were acquired with the husband's own earnings but registered in the wife's name because the Government regulations prohibited the husband from holding land. Upon the matter being referred to the Ruler of the State of Selangor in Council under the Muhammadan Law and Malay Custom (Determination) Enactment 1930, it was declared that if there was sufficient evidence to show that the lands were not a gift to the deceased wife, it should be held that the lands belonged to the husband and they should not be regarded as the estate of the deceased. The court held accordingly and the husband was awarded the whole of the property.

The Enactment of 1930 was repealed and superseded by the Administration of Muslim Law Enactment, 1952. It would appear that a divorced spouse can claim to a share of the *harta sapencharian* by virtue of section 45 subsection (3) whereby the court of a *Kathi* Besar can hear and determine any division of, or claim to, *sapencharian* property. However, under sub-section (6) of that section the court, notwithstanding the provision of this Enactment, has jurisdiction to hear and determine such claim.

A principle gleaned from these cases established that *harta sapencharian* is a matter of Malay *'adat* and is applicable only to the case of a divorced spouse who claims against the other spouse during his or her lifetime; this rule of law is local law which the court must take judicial notice and it is the duty of the court to propound it: see *Ramah* v. *Laton, supra.* In the face of the compelling authorities above, I am of the view that once it is clearly established that property was acquired subsequent to the marriage out of their joint resources or by their joint efforts a presumption arises that it is *harta sapencharian.* The presumption is rebuttable such as by evidence that the property was acquired by the sole efforts or resources of the husband or by the evidence that it was a gift made to the wife. With regard to the division of the *harta sapencharian* I can safely say that generally throughout the States of Malaya a divorced spouse is entitled to a share. The share of a Perak woman is fixed at one-third following the State Council Minute of 1907. In other States the general trend is a half share depending on the particular circumstances.

I now come to the facts which, insofar as they are uncontraverted, are these. The plaintiff was a Government servant presently carrying on a private business as a chartered accountant in Kuala Lumpur. He has held various Government posts as an accountant, rising to the appointment of Accountant-General, Malaya.

* (1937), 15/1 J.M.B.R.A.S. 73; *Taylor* at p. 78.

In 1951 he embraced the Muslim faith and married the defendant in Kuala Lumpur according to Muslim rites. It has become a truism that when a man takes a wife to himself, he takes her parents to be his parents and they become his parents-in-law; he therefore becomes part of her family. The plaintiff is no exception. He became part of her family. He assisted them in setting right her deceased father's estate under which the defendant as a beneficiary received a piece of land in Gombak and a one-seventh share of a shophouse at Batu Road. He financed his sister-in-law in her studies abroad. He was also the wife's financial adviser. Like every other Government expatriate officer in the country, he was affected by the Malayanisation scheme. Being thoughtful of the future, he decided in late 1956 to remain in the country and consequently the question of buying a house arose. They managed to negotiate for the purchase of a house (hereinafter referred to as the said property) at Setapak, Kuala Lumpur, for a price of $50,000. To cut the story short, the plaintiff raised $40,000 while the defendant raised $10,000 towards the purchase price. The sale was completed in March 1957 and the said property was registered in the defendant's name. They lived in the house until February 1962, after which they let it out at a rental of $600 per month for a period of three years with effect from 1st March, 1962. It was arranged that out of this rent the defendant was to pay the household bills. It was not the intention that the defendant should have all the rent to herself. In 1960 both plaintiff and the defendant were going on leave to Europe, and as the plaintiff was leaving earlier he opened a bank account in the name of the defendant and deposited a sum of $1,000 in order to facilitate the payment of bills while the plaintiff was abroad. It was also arranged that the rent from the house was to be credited into that account. Without going into anything like detail, in September 1963 they were divorced by the Kuala Lumpur *Kathi* according to Muslim rites. The financial details were gone into and it was agreed that the plaintiff should pay $500 per month in respect of *Eddah* for 100 days. It was also agreed that he should pay a sum of $150 per month for the maintenance of their adopted daughter. It was further agreed that he should pay a sum of $5,700 as compensation. With regard to the property in question it was suggested by the plaintiff that both he and the defendant should have an equal share. As this was not agreed upon, the parties came to this court to determine the issue.

It was urged upon me by the plaintiff that at the time of purchasing the said property it was never intended to make it as a gift to the defendant. To use his own words:

"At that time I was a Government officer and not a Federal citizen and the General Orders affecting Government officers were very strict on the subject of the ownership of land. There was no time to apply for permission. As the defendant was a Malayan citizen it was quicker to put in her name. Never intended as a gift to the defendant".

In short, it was alleged that the said property was registered in the name of the defendant for the sake of convenience.

The defendant contended that the conveyance was a gift. Under Muslim law a man may lawfully make a gift of his property during his lifetime provided the following three conditions are fulfilled. (1) Manifestation of the wish to give on the part of the donor. (2) The acceptance of the donee, whether impliedly or expressly. (3) The taking possession of the subject matter of the gift by the donee whether actually or constructively (see Outlines of Muhammadan Law by *Fyzee* at page 187; Principles of Mahomedan Law by *Mulla*, 15th Edition, at page 130). Once a gift is established it is irrecoverable either during the marriage or after divorce. It was argued that the surrounding circumstances clearly showed that a gift was intended. Firstly, it was contended that the said property was registered in her name. As this averment is closely linked with the second limb of her defence I shall deal with it in a later passage. Secondly, it was said that when the question arose as to the purchase of a joint family house by the members of the defendant's family, the plaintiff advised her not to participate in that joint venture because according to her the plaintiff wanted to buy her a house for herself. That may be so, but in my view the real purpose of discouraging her from joining that venture was that the plaintiff had advised her to invest her money in Gilchrist War Stocks in London. Thirdly, it was argued that the belated claim in respect of the said property was not made until 1963. And lastly, it was contended that if it was true that the said property was not purchased as a gift to the defendant, the plaintiff would have encountered no difficulty in obtaining Government's permission either before or after the said purchase so that the said property could be re-registered in his name. To my mind both these grounds taken by themselves may be tenable, but after considering the whole facts, so far as they appear, there cannot be any doubt in my mind as to the result which I am about to give.

In my judgment, the said property was acquired by the joint resources of the parties and I therefore hold that it is *harta sapencharian*. I am also satisfied that the evidence adduced by the defendant as it stands failed to establish fully the unequivocal manifestation of the plaintiff of an intention to make a gift of the said property to the defendant. Having arrived at this conclusion I hesitate to consider the other two conditions of a gift.

The matter does not rest here. It was strongly urged upon me, as a second limb to the defence argument that since the said property was registered in the name of the defendant, her title was indefeasible by virtue of section 42 of the Land Code (Cap. 138). Now, in *Re Noorijah deceased, supra,* the deceased's estate could have resisted the claim of the husband on the ground of indefeasibility of title under section 42 of the Land Code (Cap. 138). It must be assumed that the court was aware of that provision of law. If that was so, it would follow that the beneficiaries of the deceased could have obtained a share of the estate. Again, in *Habsah bte Mat* v. *Abdullah, supra,* it can be seen that the husband could in like manner have resisted the claim of the wife by invoking indefeasibility of title under section 43 of the Kedah Land Enactment (No. 56). Had he taken that course it may be that the plaintiff wife would have lost her claim to a half share in the land as *harta sapencharian.* I must again assume that the court had taken cognisance of section 43 of the Land Enactment. In *Hujah Lijah bte Jamal* v. *Fatimah bte Diah, supra,* if the deceased's estate had resisted the claim of the plaintiff widow by taking advantage of the indefeasibility of title provision under section 37 of the Kelantan Land Enactment, 1938, the plaintiff would have lost her claim to a half share in her husband's estate as *harta sapencharian.* It may now be asked why in those three cases the provisions of the Land Enactments with regard to indefeasibility of title were never invoked. To my mind the answer is obvious. It is implicit from the three judgments that the provisions of the Land Enactments with regard to indefeasibility of title are not amenable to matters pertaining to *harta sapencharian.* That being so, counsel's argument cannot be sustained.

Coming back to the plaintiff's claim, it is necessary to determine what is the division of the share between the plaintiff and the defendant. Although the court has power to refer such matters to the Majlis under section 41 sub-section (4) of the Administration of Muslim Law Enactment, 1952, I am prepared, in view of the circumstances of this case, to award an equal share to each of the parties if they agree.

In the circumstances, it is in the best interests of both parties that the said property be sold under the supervision of the court and the net proceeds be shared equally between them. I shall also order that the defendant pay to the plaintiff 50 *per cent.* of the total rent received by the defendant in respect of the said property from the date of the divorce up till the date of sale.

With regard to the counter-claim, the defendant is asking:

(1) a balance of $900 in respect of *Eddah.* It is admitted that a sum of $600 was paid. The plaintiff contended that the defendant had received $1,800 in respect of three months' rental at $600 per month. Since it is to be divided equally, the defendant is deemed to have received $900 as her share. I cannot accept this contention. In my view, the effective date is from the date of divorce. The money obtained from the rent was used in respect of household expenses and it cannot be said that there is certainty as to how much each party is allowed to receive under that item. I would allow this claim;

(2) a sum of $5,700 as compensation. This is admitted by the plaintiff, and I would allow the claim.

With regard to costs, each party will bear his or her own costs.

I have been asked by counsel for the defendant to stay the issue with regard to the division of the share so that he may get instructions from his client. I therefore adjourn this case to 29th November, 1965.

Raja Azlan Shah (on November 29): Having now been told by both counsel that each party agrees to a half share in the subject matter of this suit, I will order accordingly.

Order accordingly.

Solicitors: *Braddell & Ramani; Ariffin & Ooi.*

LOW PIN v. LIKOK FINANCE CO. LTD.

[A.C.J. (Abdul Aziz J.) November 22, 1965]

[K.L. — Civil Appeal No. 17 of 1965]

Landlord and Tenant — Demolition — Permission to demolish house — Plank and zinc building — Whether building premises comprised in a tenancy — Intention of landlord to demolish premises for the purpose of rebuilding — Control of Rent Ordinance, 1956, s. 12.

This was an appeal against the decision of the Rent Assessment Board, Kuala Lumpur, granting permission to the respondent to demolish a house. The grounds of appeal were in effect: (a) the building was of a temporary character and was not part of the premises comprised in the tenancy; and (b) the board had made an error on the fact that the applicant intended to recover the premises for the purposes of rebuilding.

Held: (1) whether the landlord intended to demolish the premises for the purpose of rebuilding was a question of fact and there was more than ample evidence for the board to come to a finding on this question of fact;

(2) the building was not temporary in character and was comprised in the tenancy.

Cases referred to:—

(1) *Gurcharan Kaur* v. *Rochi Silk Store* [1959] M.L.J. 229.